UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARBIE BLACK, a.k.a. Robert L. Black, Plaintiff, v. NEWTON KENDIG, *et al.*, Defendants.	Civil Action No. 96-2508 EGS/DAR

REPORT AND RECOMMENDATION

Pending for consideration by the undersigned United States Magistrate Judge are Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (Docket No. 100); and Plaintiff Barbie Black's Motion for Preliminary Injunction (Docket No. 111, Part 2), Plaintiff Barbie Black's Supplemental Motion and Memorandum for Preliminary Injunction (Docket No. 86, Part 2), and Plaintiff Barbie Black's Second Supplemental Motion and Memorandum for a Preliminary Injunction (Docket No. 89, Part 2).[1]

[1]The parties expressed their concurrence in their Joint Report on Pending, Decided or Moot Motions (Docket No. 129) that Plaintiff's motions for a temporary restraining order and expedited discovery (Docket No. 111, Part 1; Docket No. 86, Parts 1 and 3; Docket No. 89, Part 1) were moot, and on December 16, 2002, the undersigned denied those motions as moot. The Court will refer to Plaintiff's pending motions collectively as **?**Plaintiff's Motion for a Preliminary Injunction." To the extent that Plaintiff, in her first supplemental motion (Docket No. 86), seeks to **?**enjoin Defendants from undertaking further examination of Ms. Black, unless such examination is requested by Ms. Black or there is an immediate medical necessity," the undersigned finds that the court (Facciola, J.) already so ordered on June 6, 2002. Plaintiff Barbie Black's Supplemental Motion and Memorandum for Temporary Restraining Order, Preliminary Injunction and Expedited Discovery at 3. Accordingly, that request has also become moot.

Counsel for the parties appeared before the undersigned United States Magistrate Judge on December 16, 2002 for oral argument with respect to the pending motions. Upon consideration of the motions, the memoranda in support thereof and in opposition thereto and the entire record herein, the undersigned will recommend that Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment's be granted in part and denied in part, and that Plaintiff's Motion for a Preliminary Injunction be denied.

BACKGROUND

Plaintiff Barbie Black, a.k.a. Robert L. Black, a transsexual inmate in the custody of the Federal Bureau of Prisons (**?**BOP"), filed the instant action against Kenneth Moritsugu, the Medical Director of the Federal BOP, individually and in his official capacity, and Kathleen Hawk Sawyer, the Director of the Federal BOP, in her official capacity.[2] Amended Complaint ¶¶ 8, 9, 74-86. In Count I, Plaintiff alleges that Defendant Moritsugu, acting under the color of state law, violated Plaintiff's Eighth Amendment rights by failing to provide her with adequate treatment for transsexualism and **?**by failing to promulgate any policy which would have required the BOP medical staff to provide [her] with

[2]The undersigned will follow the practice of Plaintiff, Defendants and the trial court, and will refer to the Plaintiff using feminine pronouns. Plaintiff asserts that she is a transsexual, and that transsexualism is a **?**mental disorder," citing the American Psychiatric Associations' Diagnostic and Statistical Manual of Mental Disorders. Second Amended Complaint ¶¶ 8, 9. Defendants refer to Plaintiff as a **?**transsexual inmate" in their motion for summary judgment; however, they seemingly deny Plaintiff's condition in their Answer to Plaintiff's Second Amended Complaint, while admitting that transsexualism is a mental disorder and that the **?**treatise speaks for itself." Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment at 1; Answer to Plaintiff's Second Amended Complaint ¶¶ 8, 9.

treatment for transsexualism." Amended Complaint ¶ 76. In Count II, Plaintiff alleges that Defendant Hawk, in her official capacity, violated Plaintiff's Eighth Amendment rights **?**by failing to enforce the existing policy and by failing to implement any policy which would require the BOP to provide treatment to Ms. Black for transsexualism." Id. ¶ 78. In Count III, Plaintiff alleges a Fifth Amendment Equal Protection claim against Defendant Kendig based on alleged discrimination between transsexual inmates and inmates with other mental disorders **?**by requiring transsexuals inmates to prove that they received a specific form of treatment for transsexualism prior to incarceration as a prerequisite to receiving such treatment." Id. ¶ 80. In Count IV, Plaintiff alleges that Defendant Hawk was deliberate indifferent to Plaintiff's safety needs, in violation of the Eighth Amendment, by: (1) **?**designating and confining [Plaintiff] to maximum and medium security facilities"; (2) not promulgating a policy which would prohibit the BOP from designating Plaintiff to said facilities; and (3) not enforcing the BOP's existing policy. Id. ¶¶ 84-86.[3]

After over four and one-half years of protracted litigation and settlement discussions, the parties filed a Stipulation of Settlement and Dismissal (**?**Settlement Agreement") on June 23, 2001 (Docket No. 84). The Settlement Agreement provided, in pertinent part, that **?**[t]he Plaintiff will undergo a three-month diagnostic assessment, conducted by BOP staff" at one of the BOP's medical

---

[3]During the course of the litigation, the parties briefed, and the trial court granted in part, and denied in part, Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (Docket No. 14), and denied Plaintiff's Motion for a Preliminary Injunction (Docket No. 21), in a single Opinion and Order filed August 31, 1998 (Docket Nos. 52, 53) (hereinafter **?**Opinion and Order"). More specifically, the court granted summary judgment with respect to Plaintiff's Eighth Amendment claims against Defendants for failure to promulgate a policy requiring BOP to provide Plaintiff with treatment for transsexualism and claims against Defendant Moritsugu in his individual capacity, and denied Defendants' motion with respect to the remaining claims.

facilities such as the Federal Medical Center in Butner, North Carolina." Settlement Agreement at 2. **?**Dr. Fredrick S. Berlin will perform a diagnostic assessment and propose a treatment plan." Id. Further, the Settlement Agreement provided that **?**[a]t the option of the BOP, a second consulting doctor of the BOP's choosing, may perform a diagnostic assessment and propose a treatment plan." Id. Paragraph five of the Settlement Agreement, provides:

> The BOP's Medical Director, Dr. Newton E. Kendig, will review the BOP's assessment and treatment plan, together with the assessment(s) and treatment plans(s) [sic] prepared by Dr. Berlin and the BOP's consulting doctor, if any. Dr. Kendig will then decide which plan, or combination of plans, will be offered to plaintiff. If any plan includes a recommendation for hormone therapy, Dr. Kendig will decide whether the BOP should initiate such therapy. His decision will be final, pursuant to the applicable BOP program statement.

Id. at 2-3. In Paragraph 18, the parties provided for the dismissal of Plaintiff's remaining claims without prejudice, and **?**the right to reinstate within 120 days after the decision contemplated in paragraph 5." Id. at 4.

On May 10, 2002, Defendant Kendig issued a **?**Treatment Plan for Inmate Robert Black" as contemplated by paragraph five of the Settlement Agreement. Pursuant to paragraph 18, Plaintiff reinstated **?**her claims previously dismissed without prejudice" on May 21, 2002. Plaintiff's Notice of Reinstatement (Docket No. 109). Thereafter, the instant motions were filed and this Court, with the consent of the parties, granted Plaintiff's motion for leave to file a Second Amended Complaint.[4]

---

[4]Plaintiff's Second Amended Complaint contains many of the same allegations as Plaintiff's Amended Complaint, with a few notable exceptions. First, Defendant Newton E. Kendig, the individual now occupying the position of Medical Director of the BOP, is substituted for Kenneth P. Moritsugu, who held the position when this action was commenced. Second Amended Complaint ¶ 5. Second, Plaintiff does not state an Eight Amendment claim for failure to promulgate a policy requiring BOP to provide Plaintiff with treatment for transsexualism, as Defendants were granted summary judgment with respect to that claim by the trial judge. See n.3, supra. Third, Plaintiff states a breach of contract claim alleging Defendants breached the settlement agreement. Id. ¶¶ 100-102.

DISCUSSION

I. Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment

In evaluating a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted, all well-pleaded factual allegations of the complaint are to be construed in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Fernando v. Rush-Presbyterian-St. Luke's Medical Center, 882 F. Supp. 119, 121 (N.D. Ill. 1995). The factual allegations of the complaint must be presumed true and liberally construed in favor of plaintiff. Shear v. National Rifle Ass'n,, 606 F.2d 1251, 1253 (D.C. Cir. 1979); Phillips v. Bureau of Prisons, 591 F.2d 966, 968 (D.C. Cir. 1979) (citing Miree v. DeKalb County, Georgia, 433 U.S. 25, 27 n.2 (1977)). The court must accept as true all reasonable inferences to be drawn from the well-pleaded factual allegations. Fernando v. Rush-Presbyterian-St. Luke's Medical Center, 882 F. Supp. 119, 121 (1995).

In determining a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Shear, 606 F.2d at 1253; Soeken v. Herman, No. 98-2024, 1999 WL 77383, at *2 (D.D.C. Feb. 17, 1999). However, if matters outside the pleadings are presented and not excluded by the court, a motion to dismiss for failure to state a claim upon which relief can be granted shall be treated as a motion for summary judgment and decided in accordance with Rule 56. Id.

Alternatively, summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). The nonmoving party cannot merely rest upon the allegations included in the complaint, and instead, must identify the specific facts which demonstrate that there is a genuine issue for trial. Anderson, 477 U.S. at 248. The burden is upon the nonmoving party to demonstrate that there are material facts in dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. Material facts are in dispute if they are capable of affecting the outcome of the suit under governing law. Id. In considering a motion for summary judgment, all evidence and inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." Anderson, 477 U.S. at 255; see also Bayer v. United States Dept. of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992).

Defendants move to dismiss or, in the alternative, for summary judgment with respect to each of the five counts contained in Plaintiff's Second Amended Complaint. Upon careful consideration of Plaintiff's Second Amended Complaint, the undersigned finds that it indeed "appears beyond doubt" that Plaintiff "can prove no set of facts in support of [her claims] that would entitle [her] to relief" with

respect to Count V. Conley, 355 U.S. at 45-46. Accordingly, the undersigned will recommend that the court grant Defendants' motion to dismiss for failure to state a claim upon which relief can be granted with respect to that claim, and finds no basis for consideration of the limited evidence offered by the parties, or the other grounds upon which dismissal was sought by Defendants. With respect to Counts I, II, III and IV, the undersigned will recommend that Defendants' motion be denied, as there remain genuine issues as to material facts.

A. Counts I through IV of Plaintiff's Second Amended Complaint

On August 31, 1998, the trial court filed an Opinion and Order granting in part, and denying in part, Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment with respect to Plaintiff's Amended Complaint. The dispositive motion now pending, which bears the same caption, is supported by a single declaration.[5] As the claims set forth by Plaintiff in her Second Amended Complaint are virtually identical to those alleged in the first, and as the record remains nearly unchanged since the issuance of the Opinion and Order, the undersigned finds, for the precise reasons offered by the trial court in his Opinion and Order, that genuine issues of fact exist which preclude the entry of summary judgment. Opinion and Order at 9, 13, 15.[6] Accordingly, the undersigned recommends that Defendants' motion be denied with respect to the claims asserted in Count I against

---

[5]The Declaration of Capt. Newton E. Kendig, M.D. is the only exhibit to the dispositive motion now pending. By contrast, four declarations and at least 18 exhibits accompanied the motion to dismiss or for summary judgment which the trial court considered.

[6]Plaintiff's Second Amended Complaint does not reassert the Eighth Amendment claims against Defendant Kendig and Defendant Hawk for their failure to promulgate a new policy, previously contained in Counts I and II of the Amended Complaint, as to which the trial judge granted summary judgment. Second Amended Complaint ¶¶ 89-92; compare Amended Complaint ¶¶ 76, 78.

Defendant Kendig in his official capacity, and all of the claims in Counts II-IV.

B. Claims Against Defendant Kendig in His Individual Capacity

In Count I of the Second Amended Complaint, Plaintiff asserts an Eighth Amendment claim against Defendant Kendig, in his individual capacity, for **?**deliberately preventing the BOP staff from providing [Plaintiff] with adequate treatment for transsexualism." Second Amended Complaint ¶ 90. Defendant Kendig asserts the defense of qualified immunity, and maintains that the trial court already determined this issue when the court held that Defendant Moritsugu, Defendant Kendig's predecessor, was entitled to qualified immunity. Opinion and Order at 16 (finding **?**his actions did not violate a clearly established constitutional right").[7] However, Plaintiff contends that **?**the facts have changed since the Court's Order, and Dr. Kendig's conduct clearly violates Eighth Amendment principles" and

---

[7]Defendant Kendig also submits that as an officer in the Public Health Service, he is absolutely immune from suit under the Public Health Service Act, 42 U.S.C. § 233(a). Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 19 (citing Cuoco v. Moritsugu, 22 F.3d 99 (2d Cir. 2000)). Although the court in Cuoco found that the BOP's Medical Director was entitled to absolute immunity pursuant to the Public Health Service Act, the court also stated that

> [i]f [plaintiff] alleged and could prove that either of these defendants violated her constitutional rights in the course of something other than the performance of a medical or related function, or while acting outside the scope of his employment, § 233(a) would not, of course, provide that defendant with absolute immunity.

Cuoco, 222 F.3d at 109 (emphasis supplied). Because there remains a genuine issue as to whether Defendant Kendig acted **?**in the course of . . . the performance of a medical or related function,"or while **?**acting outside the scope of his employment," the undersigned recommends that Defendant Kendig's motion for summary judgment on the basis of absolute immunity be denied. Moreover, the undersigned finds that §233(a) does not entitle Defendant Kendig to absolute immunity in this action, as that statute simply provides that the Federal Tort Claims Act, 28 U.S.C. § 1346(b), is the exclusive remedy for personal injury claims against **?**any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment[.]" 42 U.S.C. § 233(a).

he is, therefore, not entitled to qualified immunity. Plaintiff Barbie Black's Consolidated Reply in Support of her Motion for Temporary Restraining Order and Preliminary Injunction, and in Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 24. Plaintiff asserts that "[t]here is evidence that Dr. Kendig ignored the seven unanimous opinions of specialists when he denied virtually any treatment to [Plaintiff]."[8] Id. at 25. Defendants, in their reply, assert that Plaintiff has demonstrated only "that other doctors disagree with Dr. Kendig as to whether she should receive hormone therapy[,]" and that such a showing is insufficient to establish deliberate indifference. Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 8 (citing White v. Farrier, 849 F.2d 322 (8th Cir. 1988)).

The trial court, in his Opinion and Order, held that "[b]ecause plaintiff is only entitled to some type of treatment, and because plaintiff has shown only that Defendant Moritsugu denied plaintiff a particular type of treatment, namely hormone therapy, the Court concludes that Defendant Moritsugu is entitled to qualified immunity as his actions did not violate a clearly established constitutional right." Opinion and Order at 16. Implicit in the trial court's holding was a finding that some type of treatment was, or would be, made available for Plaintiff's transsexualism. Id. at 7, 15, 16. The undersigned finds, however that there are genuine issues of fact as to whether Defendant Kendig has made any form of treatment available to Plaintiff for her transsexualism.

---

[8]The claim is an apparent reference to Defendant Kendig's final determination, made in accordance with paragraph five of the Settlement Agreement, that Plaintiff "should not be treated with hormones for [her] complaint of gender dysphoria while [she] is incarcerated" but that she "should have psychological services available to [her] on an as needed basis." Plaintiff Barbie Black's Motion for Temporary Restraining Order and Preliminary Injunction, Memorandum to Christopher Erlewine from Newton E. Kendig dated May 10, 2002 (Exhibit 5) ¶¶ 5, 2.

To overcome a qualified immunity defense, a plaintiff must show that the defendant violated a ?clearly established statutory or constitutional right of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Accordingly, the Court must first consider whether plaintiff alleges that defendant violated a clearly established statutory or constitutional right, and then evaluate ?whether [defendant's] alleged acts (or failures to act) could possibly violate that right." Farmer v. Moritsugu, 991 F. Supp. 19, 25 (D.D.C. 1998). Deliberate indifference to a prisoner's serious medical condition violates the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). This court has held that ?[b]ecause transsexualism is a serious medical condition, the Supreme Court's decision in Estelle mandates that transsexuals have a right to receive treatment." Farmer, 991 F. Supp at 26, rev'd in part, on other grounds, 163 F.3d 610 (D.C. Cir. 1998) (citation omitted); Cuoco v. Moritsugu, 22 F.3d 99 (2d Cir. 2000).[9] However ?while a transsexual inmate is constitutionally entitled to some type of medical treatment, he is not entitled to a particular type of treatment, such as estrogen therapy." Opinion and Order at 16 (citation omitted).

In accordance with paragraph five of the Settlement Agreement, Defendant Kendig, on May 10, 2002, issued the final plan for treatment to be offered to Plaintiff. Plaintiff Barbie Black's Motion

---

[9]The trial court in Farmer ?conclud[ed], in agreement with the Sixth, Seventh, Eighth and Tenth Circuits, that transsexualism is a serious psychiatric disorder" and therefore ?transsexuals have a right to receive treatment" under Estelle, 429 U.S. at 97. Farmer, 991 F. Supp at 26 (referring to Brown v. Zavaras, 63 F.3d 967 (10th Cir.1995); Phillips v. Michigan Dept. of Corrections, 731 F. Supp. 792 (W.D.Mich.1990), aff'd, 932 F.2d 969 (6th Cir.1991); White v. Farrier, 849 F.2d 322 (8th Cir.1988); Meriwether v. Faulkner, 821 F.2d 408 (7th Cir.1987); Supre v. Ricketts, 792 F.2d 958 (10th Cir.1986)). Because this circuit, on appeal in Farmer, ?deem[ed] it unnecessary to reach the question of whether or not transsexualism is a serious medical condition[,]" 163 F.3d at 615, the undersigned applies the precedent established by the trial court in Farmer, for the reasons provided therein, and finds that transsexualism is a serious medical condition. Farmer, 991 F. Supp. at 26.

for Temporary Restraining Order and Preliminary Injunction, Memorandum to Christopher Erlewine from Newton E. Kendig of May 10, 2002 (Exhibit 5) (?Defendant Kendig's final treatment plan"). However, the undersigned finds that the treatment plan is rife with ambiguity. Without addressing Plaintiff's transsexualism, Defendant Kendig states - - without explanation - - that Plaintiff ?is not currently in need of intensive psychiatric or medical services[.]" Id. ¶ 1. Next, while Defendant Kendig, in the final treatment plan, states that ?[Plaintiff] should have psychology services available to [her] on an as needed basis[,]" the context of the offer makes evident that such unspecified ?psychology services" are being offered as a consequence of Plaintiff's ?history of suicidal behavior[,]" and not as treatment for transsexualism. Id. ¶ 2. Finally, Defendant Kendig states that ?further evaluations" - - but not treatment - - will be provided ?when clinically indicated." Id. ¶ 4. Thus, not only does Defendant Kendig completely fail to recommend any course of treatment for Plaintiff's transsexualism; Defendant Kendig, in his final treatment plan, even fails to acknowledge that Plaintiff currently suffers from transsexualism or any mental, or other, illness. Id. ¶ 5 (?[Plaintiff] should not be treated with hormones for [her] complaint of gender dysphoria")(emphasis supplied).[10]

The undersigned is cognizant of this circuit's holding in Farmer that the BOP's Medical Director is entitled to qualified immunity from a transsexual prisoner's Bivens action alleging deliberate indifference to prisoner's serious medical needs. However, the undersigned finds that the facts of this case are distinguishable from those considered by the circuit in Farmer. The circuit's holding in Farmer

---

[10]The trial court predicated its finding that Defendant Moritsugu was entitled to qualified immunity upon the determination that a transsexual inmate is constitutionally entitled to ?some type of medical treatment," and that ?plaintiff has shown only that Defendant Moritsugu denied plaintiff a particular type of treatment[.]" Opinion and Order at 16. By contrast, Defendant Kendig's plan does not provide for any medical treatment.

was, in large part, premised on the finding that ?Farmer's claims imply an obligation falling outside the scope of [the Medical Director's] role as Medical Director." Id. at 614. The circuit observed that

> the most important point in this case is that [the Medical Director] is not the person with the BOP who determines whether psychotherapy is required in a given case. As Medical Director, overseeing operations in facilities nationwide from his office in Washington D.C., [the Medical Director] does not diagnose individual patients; nor does he prescribe treatments for particular patients, except insofar as he may be called upon to approve the recommendation of a treating physician. Such determinations are made at the local level, i.e. within individual BOP institutions.

163 F.3d at 615. In finding that Farmer's attempts to seek recourse against the Medical Director were ?misguided[,]" the circuit concluded that

> [i]t is unimaginable, however, that [the Medical Director] should be available to intervene in established process on behalf of every BOP inmate who happens to be dissatisfied with his or her medical treatment. This is particularly true where, as here, the requests were completely unsupported by treatment records or recommendations from local medical personnel establishing a need for treatment.

Id.

Any argument that the holding in Farmer precludes a finding that Defendant Kendig's not entitled to qualified immunity is undermined by the fact that the very terms of the Settlement Agreement require that Defendant Kendig act as the deciding authority with respect to Plaintiff's course of treatment. Under the Settlement Agreement, Defendant Kendig's role was no longer merely to approve the recommendations of treating physicians at the local level, but rather to independently determine the course of Plaintiff's treatment. Settlement Agreement at 3. The most prominent example of the broad role Defendant Kendig assumed pursuant to the terms of the Settlement Agreement is that he rendered a final decision which was contrary to all of the recommendations provided by the various treating and consulting physicians, three of whom were ?local medical

personnel" at the Federal Medical Center at Butner.

Because the undersigned finds that there remains a dispute as to whether Defendant Kendig has made treatment available to Plaintiff for her transsexualism, the undersigned recommends that Defendant Kendig's motion for summary judgment on qualified immunity grounds be denied.

C. Plaintiff's Breach of Contract Claim

In Count V of the Second Amended Complaint, Plaintiff alleges that

> Dr. Kendig's and BOP's decision not to provide [Plaintiff] with hormone therapy despite the unanimous recommendations of the seven doctors who examined her constitutes (i) a breach of the Settlement; (ii) an act of bad faith; (iii) a breach of Defendant's covenant of good faith and fair dealing; and (iv) contempt of this Court's Order.

Second Amended Complaint ¶ 103. Defendants move to dismiss Plaintiff's breach of contract claim on the ground that **?**[t]here is nothing in the parties' settlement agreement that requires the BOP to provide Plaintiff with hormone therapy, under any circumstances." Memorandum in Support of Defendants' Motion for Summary Judgment or, in the Alternative, Motion to Dismiss at 23. Plaintiff, in her opposition, states that **?**the only reasonable interpretation of the parties' settlement agreement demonstrates that Defendants have breached the agreement." Plaintiff Barbie Black's Consolidated Reply in Support of her Motion for Temporary Restraining Order and Preliminary Injunction, and in Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 30. Plaintiff argues that the language of the Settlement Agreement **?**makes plain that Dr. Kendig was limited to deciding which treatment plan or combinations of plans he was going to offer to [Plaintiff], not whether he was going to offer any treatment at all to [Plaintiff]," and accordingly, his decision to deny hormone therapy, while all of the treatment plans proposed hormone therapy, constituted a breach of

the Settlement Agreement. Id. at 11 (emphasis omitted).

Paragraph five of the Settlement Agreement undisputably gives Defendant Kendig authority to propose the final treatment plan to be offered to Plaintiff. Settlement Agreement at 2-3 (**?**Dr. Kendig will then decide which plan, or combination of plans, will be offered to plaintiff. . . . His decision will be final, pursuant to the applicable BOP program statement.") Plaintiff's assertion that Defendants breached the Settlement Agreement by failing to provide Plaintiff with hormone therapy is unfounded, given the third sentence in paragraph five, which provides that **?**[i]f any plan includes a recommendation for hormone therapy, Dr. Kendig will decide whether the BOP should initiate such therapy." Id. at 3. Accordingly, the undersigned recommends that Defendants' motion to dismiss be granted with respect to Count V of Plaintiff's Second Amended Complaint, as the Plaintiff **?**can prove no set of facts in support of [her] claim that would entitle [her] to relief." Conley, 355 U.S. 41, 45-46 (1957).

II. Plaintiff's Motion For a Preliminary Injunction

Plaintiff seeks a **?**preliminary injunction directing Dr. Kendig to order the treatment of hormone therapy for [Plaintiff] in accordance with the recommendations of Dr. Jean P. Zula, M.D., Chief Psychiatrist at Federal Medical Center in Butner, North Carolina."[11] Plaintiff Barbie Black's Motion for Temporary Restraining Order and Preliminary Injunction at 2.

---

[11]Plaintiff also states that she seeks a preliminary injunction to enjoin Defendants from transferring her from the Federal Medical Facility in Butner, North Carolina; however, this aspect of Plaintiff's motion has since become moot, as Plaintiff was transferred from the Federal Medical Center to the Federal Correctional Institute in Butner following the automatic expiration of the injunctive relief provided in the Court's May 21, 2002 Order. Notice of Automatic Expiration of Injunctive Relief or, in the Alternative, Automatic Stay (Docket No. 112).

To prevail on her request for a preliminary injunction, the plaintiff must demonstrate: (1) a substantial likelihood of success on the merits; (2) that she would suffer irreparable injury were an injunction not granted; (3) that an injunction would substantially injure other interested parties; and (4) that the grant of an injunction would further the public interest. Al-Fayed v. C.I.A., 254 F.3d 300 (D.C. Cir. 2001); Katz v. Georgetown University, 246 F.3d 685 (D.C. Cir. 2001).

In the Opinion and Order issued by the court over four and one-half years ago, the court held that **?**[a]s plaintiff admits that she has not been receiving estrogen for a number of years, plaintiff cannot make a showing of irreparable harm sufficient to obtain a preliminary injunction.**"**[12] Opinion and Order at 17. The undersigned finds, for the same reasons on which the trial judge relied, that Plaintiff cannot make the requisite showing of irreparable harm, and therefore recommends that Plaintiff's motion for a preliminary injunction be denied.[13]

CONCLUSION

For the foregoing reasons, it is, this _____ day of March, 2003,

RECOMMENDED that Defendants' Motion to Dismiss or, in the Alternative, for Summary

---

[12]Though couched as a request to implement Dr. Zula's treatment recommendation, the undersigned finds that Plaintiff's current request for injunctive relief is identical to Plaintiff's earlier request to enjoin Defendants from denying her estrogen therapy, as Dr. Zula's treatment recommendation was for Plaintiff to receive hormone therapy. Plaintiff Barbie Black's Motion for Temporary Restraining Order and Preliminary Injunction, Forensic Evaluation (Exhibit 2) at 15.

[13]The parties concede that **?**[p]laintiff has introduced female hormones into the BOP institutions and has consumed them without medical supervision." Defendants' Statement of Material Facts Not in Dispute ¶ 7. However, the undersigned finds that this admission is of intermittent use of unidentified substances, and does not undermine the finding that hormones have not been administered by the BOP since Plaintiff has been in custody.

Judgment (Docket No. 100) be **GRANTED IN PART**, and that Count V of Plaintiff's Second Amended Complaint be dismissed; and it is

FURTHER RECOMMENDED that in all other respects, Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (Docket No. 100) be **DENIED**; and it is

FURTHER RECOMMENDED that Plaintiff Barbie Black's Motion for Preliminary Injunction (Docket No. 111, Part 2), Plaintiff Barbie Black's Supplemental Motion and Memorandum for Preliminary Injunction (Docket No. 86, Part 2), and Plaintiff Barbie Black's Second Supplemental Motion and Memorandum for a Preliminary Injunction (Docket No. 89, Part 2) be **DENIED**.

DEBORAH A. ROBINSON
United States Magistrate Judge